CASE NO. 80-420

IN THE

Supreme Court of the United States

October Term, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT

Petitioners,

—vs—

STATE OF OHIO

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT, STATE OF OHIO

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Proposition of Law No. 2

THE COURT OF APPEALS, IN REVIEWING A MUNICIPAL COURT DISMISSAL OF CRIMINAL CHARGES ON DISCRIMINATORY ENFORCEMENT GROUNDS, MUST RULE ON THE SUFFICIENCY OF THE DEFENDANT'S EVIDENCE IN ESTABLISHING UNCONSTITUTIONAL ENFORCEMENT AMOUNTING TO CONSCIOUS, DELIBERATE, AND ARBITRARY DISCRIMINATION, AND IF THE DEFENDANT HAS NOT MET SUCH HEAVY BURDEN TO REMAND FOR TRIAL 68

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CASE NO. 80-420

IN THE SUPREME COURT OF THE UNITED STATES

LARRY FLYNT, ET AL.

Petitioners

-vs-

STATE OF OHIO

Respondent

BRIEF OF RESPONDENT, STATE OF OHIO

QUESTION PRESENTED

Whether the Ohio Court of Appeals and Ohio Supreme Court properly held that Petitioners, Defendants in a criminal action for violation of Ohio Pandering Obscenity statute, were not entitled to dismissal of such action on grounds of alleged unconstitutional discriminatory enforcement and that case should be remanded for trial in Cleveland Municipal Court on such misdemeanor charges.

STATEMENT OF THE CASE

The Supreme Court of Ohio, in an opinion reported as State v. Flynt, 63 Ohio St.2d 132 (1980), affirmed the Cuyahoga County Court of Appeals decision to remand the misdemeanor pandering obscenity charges against the Petitioners for trial.

The case began in June of 1976, when an anonymous citizen sent a copy of the July 1976 issue of "Hustler" magazine to the Cleveland Police Special Investigation Unit and complained about the issue and specifically about a cartoon showing sexual activity between President Ford, Secretary Kissinger, and Vice-President Rockefeller and the Statute of Liberty. Shortly thereafter, the Special Investigation Unit and its Obscenity Investigation Detail received telephone calls from citizens complaining about this issue of "Hustler" and the

cartoon. (See Transcript at A-55-56, A-59-60, A-124-25.) These police then investigated whether the magazine was being sold in Cleveland and just what "Hustler" magazine was as far as content was concerned. The police requested a ruling from this attorney, then Assistant Law Director, as to whether the officers of Hustler's corporation could be charged in Cleveland for the crime of Pandering Obscenity in relation to the July 1976 issue. (Transcript at A-55-56 A-100.) "Hustler" magazine was the only material under investigation at that time, because it was the only one on which complaints were received, but other magazines were investigated after the decision to prosecute "Hustler" had been made. (Transcript at A-96-98, A-124.) The July issue of "Hustler" was reviewed by this writer and then the police secured a review of the magazine from several

municipal court judges (not including, at that time, Judge Calandra who later signed the arrest warrants and was subsequently assigned these cases through the court's lottery assignment method). (Transcript at A-127.)

Defendants were arrested in July of 1976, and the cases were assigned to Judge Salvatore Calandra. The hearing on the discriminatory prosecution issue was heard by the court on February 28, 1977, (See Transcript in Joint Appendix at A-29-144.) and the Memorandum to Attorneys and dismissal of charges was entered on May 17, 1977. (A-5-7).

The State received leave to appeal the dismissal, and the Cuyahoga County Court of Appeals reversed and remanded on February 8, 1979. (A-8-16.) The Ohio Supreme Court affirmed the Court of Appeals on July 16, 1980. (A-17-27). Both the Ohio Supreme Court and the Court

of Appeals held that Judge Calandra had not applied the correct legal principles to the facts established at the hearing, and that a case of unlawful discrimination had not been made. This Court granted Certiorari on December 8, 1980.

Testimony at Motion Hearing

On February 28, 1977, the Muncipal Court held a hearing on the Motion to Dismiss to take testimony concerning the allegations of unlawful discrimination. The defense called this attorney, then Assistant Law Director, to the stand first. Upon preliminary questioning, it was disclosed that the City had made over 500 arrests which led to prosecutions on films and magazines from Cleveland's "adult" bookstores and theatres. (Transcript at A-32.) Although most materials were explicit, some cases (perhaps 10%) involved child nudity, female masturbation, and newspapers such

as "Screw" and "Smut" which did not involve intercourse or penetration clearly shown. (Transcript at A-43-46.)

The prosecutor then summarized his views on "hard-core" from a street sense and a legal sense, distinguishing the "lewd exhibition of the genitals" option of the "Miller Test" from the street sense of hard-core penetration. (Transcript at A-48-53.)

"Hustler" was the first national magazine with a second class mailing privilege which was being prosecuted, but the police then became familiar with several other of these magazines. (Transcript at A-85-86, see also pages A-57 and A-114.) The Assistant Prosecutor's original intention to bring further prosecutions was conditional only, "because we're waiting for this case"; and whether those cases would definitely follow, "I don't know. That decision I

can't make alone either."; but, "It's being discussed". (Transcript at A-86.) The prosecutor admitted the likeness in "format" of several of these magazines (Transcript at A-87-89.), but explained the differences between "Hustler" and others. (Transcript at A-89-92.)

The defendants in this case were selected by their listing as officers of "Hustler" in the magazine (Transcript at A-98), and the charges followed the request by the police as to whether "Hustler" could be prosecuted in Cleveland. (Transcript at A-100.)

The role of this attorney in primarily deciding to prosecute "Hustler" after police request, as compared to the further role of superiors which may have been necessary against other magazines (because of the unusual publicity and complexity which arose in this case), was disclosed. (Transcript at A-102-103, See

also: A-86.) However the prosecutor summarized his intent (A-103) as to prosecuting others as follows:

> THE WITNESS: [Mr. Taylor] "My decision wouldn't be any different. I would be willing to prosecute anyway. Certainly maybe a decision above me would prevent me which didn't prevent me in this case".

Among the legitimate considerations in an obscenity case, particularly, are public reaction (A-103), cost and time expended on certain classes of cases (A-103), publicity and jury verdict as measures of community standards (A-103-05).

The prosecution then made an independent statement as if he were asking himself questions, due to the fact no other prosecutor was present to object or cross-examine, and the prosecutor related the action of the City against several magazines being displayed at the municipal airport. (Transcript at A-109).

The prosecution then summarized his decision to first prosecute "Hustler" as opposed to any or several others. One reason was the considered judgment that the "Hustler" magazine which was the subject of the complaint was, in fact, probably obscene. Another reason was the ability to charge and serve arrest warrants on the officers of "Hustler" with the misdemeanor, a tactic not available as to officers of other magazines. See Transcript at A-109-10, as follows (See also A-111-12):

> THE WITNESS: [Mr. Taylor] . . . "Another question, if you were to ask me or if I were to ask me, what were some of the reasons for prosecuting Hustler.
>
> I would have to first say that after it was brought to our attention, maybe because of the cartoons and that's the only thing the people mentioned on the phone, it didn't matter. I had to review the magazine and the judge had to review the magazine as a whole. And another consideration has to be since we only have misdemeanor

> jurisdiction, we can only serve warrants from our Municipal Court in the State of Ohio. If we were going to prosecute Penthouse magazine, we wouldn't be able to prosecute the owners or the publishers of the magazine because we don't have any extradition power.
>
> Larry Flynt and his brother and now, his wife, reside and operate from Columbus, Ohio, which is in our jurisdiction. We can arrest them, and that was one of the major considerations to going against Hustler instead of something else.
>
> If we were going to enter into this field, we had to decide how we were going to do it. Certainly we can arrest Hustler magazine officers because the misdemeanor warrants issued from Cleveland can be served in Columbus. Misdemeanor warrants cannot be served in Chicago or London. That's another consideration for the reason we prosecuted Hustler magazine in the first place--"

The prosecutor continued with his statement of explanation that a test case on a "nationwide second class mailing privilege magazine" should not start with a local retailer, since this case was thought to be one of "first impression"

involving this genre of magazine. See Transcript at A-114, as follows (See also A-115):

> THE WITNESS: "I'd like to explain to the court that when we decided whether or not to prosecute Hustler magazine, and in deciding who to prosecute, since we felt that a nationwide second class mailing privilege magazine had heretofore had not been subject of day-to-day litigation, we felt it might be unfair to pick as our first target some man who has been selling, like everybody else, has been selling for years; and we felt the people who should be responsible were the people who make the magazine. That's why we did not arrest anyone in the Cleveland area, and arrested Larry Flynt and his officers."

Starting a test case against the owners and officers of one of the magazines seemed to be more fair and appropriate. Though it did attract more attention, the prosecutor was not then familiar with the reputation of the Defendants. In fact, the Cleveland case started before the prosecutor or police knew anything about Larry Flynt or his

recent indictment in Cincinnati. (Transcript at A-15.)

The trial judge found, in his Memorandum (A-6), that the City had only prosecuted "hard core pornography" from "adult" bookstores in the past; that other magazines were not prosecuted that contained "some hard core material"; that "Hustler" "did not contain hard core material" and that similar magazines were not prosecuted.

The trial court then discounted the fact this is the first case of its kind and concentrated on it's being the only case at the time. The court felt that the applicable law was to the effect that if other magazines are obscene then the City cannot prosecute only "Hustler". The court found that whether this was a test case was "legally insufficient" to sustain the prosecution.

Taking all the facts found by Judge

Calandra as true, the Court of Appeals (unanimously) and the Ohio Supreme Court (with one dissent) decided that the correct law of unconstitutional discrimination had not been applied. These Courts held that using a first case of this type as an intended "test case" was not a discriminatory purpose and that no evidence was given by the witness, nor found by the trial court, which showed any invidious motive to the selection of "Hustler". In the absence of such proof, the case was remanded for further proceedings.

SUMMARY OF ARGUMENT

It is admitted that the City's prosecution of "Hustler" magazine represents the first attempt to test the obscenity law against the standards of the Cleveland community toward a magazine which is sold nationwide and openly and has a federal second class mailing

privilege. This case was begun in 1976, before the conviction of the "Hustler" defendants in Cincinnati and in other states which brought them to nationwide attention. There is a simple reason for the selection of a single magazine to become a test of the law and the jury's judgment of standards. Obscenity cases are special in criminal law in that community standards can change, being "contemporary" for purposes of prosecution, and the class or type of materials subject to trial may change. Cleveland had a systematic history of vigorous obscenity law enforcement and wished to test Cleveland's standards of decency against the contemporary variety of "men's sophisticate" magazines to gauge the level of sexual explicitness or permissiveness the community feels should be tolerated as acceptable under the obscenity law.

As pointed out in the Transcript, at A-83-92, there are other so-called "adult" magazines on the market. Some others may be obscene as well, but "Hustler" was felt to be more so and a better title to begin with in order to increase the likelihood of success. Also, we could arrest these defendants by warrant, since "Hustler" was the only one of these published in Ohio. In order to charge others at the same time, we would have had to charge local merchants or distributors, since at that time it was believed, however mistakenly, that extradition could be sought only for a felony charge and not for an obscenity misdemeanor. These were the reasons for making this a "test" case. We were trying to determine if the genre of "men's" magazines had tread beyond the standards for obscenity. "Hustler" was picked for convenience of attaining process and

jurisdiction against persons responsible for the magazine, and to make a first case against a magazine we felt was more crass and had less saving features than other known "men's" magazines. (See Transcript at A-109-10, and 114 for prosecutor's explanation, also pages A-89-92 for comparison of "Hustler" with others).

Also to be considered, especially in obscenity litigation, is that each title of each magazine, and each monthly or periodical edition of each magazine, must be judged on its own, and any finding has no effect on other titles or editions, except as a deterrent. This Court in Hamling v. U.S., 418 U.S. 87, at 126 (1974), stated that whether a magazine has a second class mailing privilege has no bearing on its obscenity. The Court further noted distinctly that any magazine to be prosecuted must be judged independently and not on comparison to

others alleged to be similar. Id., at 125-26.

It was testified also (Transcript at A-40, 43-45, 48-50, 54, 57-58, 109) that the City has prosecuted other materials which did not show explicit penetration, such as "Screw" and "Smut" and some films, and took action against the magazines mentioned by the defense as other "men's" magazines at our Airport newsstands.

The Court of Appeals explained the major flaws in the defendants' proof, and held that their burden of proof had not been met (A-8-15). This decision was upheld on the same ground by the Ohio Supreme Court. See: State v. Flynt, 63 Ohio St.2d, at 134-36 (A-20-23).

It is the position of Respondent that there are several established principles which, when applied to the facts of this case, support the Ohio

Supreme Court's decision to remand this matter for trial:

1. The burden is on the defendant to show that he has been singled out for prosecution.

2. That the evidence must show the defendant is one of a class of substantially similar violators of the law.

3. That the exclusion of other guilty parties is affirmatively shown to be part of a conscious, intentional, and deliberate policy or practice on the part of a prosecutor who knowingly enforces such policy over a period of time.

4. That the prosecutor's invidious policy is clearly designed to harass the defendant in order to prevent the exercise of a fundamental right or to suppress a certain class of persons with no rational basis for distinction.

5. That the prosecution is not a bona fide test case but rather is shown to be in bad faith with no hope of obtaining a valid conviction.

LAW AND ARUGMENT

Proposition of Law No. 1

IN ORDER TO HAVE CRIMINAL CHARGES DISMISSED ON EQUAL PROTECTION GROUNDS, THE DEFENDANTS MUST MEET A HEAVY BURDEN OF PROVING CONSCIOUS AND INTENTIONAL DISCRIMINATION.

This case presents one issue, that of the legality of the City of Cleveland's effort to prosecute officers of "Hustler" magazine for Pandering Obscenity under R.C. 2907.32.

First to be considered is whether the Petitioners met their burden of proof upon their Motion to Dismiss in the trial court. It has been universally and historically followed in virtually every state and federal district that such is their burden. See: Annotation, "What

Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in State Criminal Proceedings", by John S. Herbrand, 95 A.L.R.3d 280 (1978), and Annotation, "Prosecution: What Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in Federal Criminal Proceedings", by John S. Herbrand, 45 A.L.R. Fed. 732 (1979).

It must generally be shown that the prosecution engaged in invidious discrimination amounting to bad faith harassment based upon arbitrary classification. Snowden v. Hughes, 321 U.S. 1, 7-8, 88 L.Ed.2d 497, 502-03 (1944); Oyler v. Boles, 368 U.S. 448, 454-56, 7 L.Ed.2d 446, 452-53 (1962); State v. Streurer, 37 Ohio App.2d 51, 58-59, 306 N.E.2d 425, 429-30 (Summit County, 1973), cert. den. 416 U.S. 940 (1974).

A. Supreme Court Decisions On Discriminatory Prosecution

The general principles of law applicable to unconstitutional discrimination in the application of valid criminal statutes began in this Court with the cornerstone case of Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220 (1886). The Court considered an ordinance which left the enforcement solely to the discretion of the sheriff, and held that enforcement offended the Fourteenth Amendment because the law was enforced "with a mind so unequal and oppressive as to amount to a practical denial" of equal protection of the laws. The Court then stated a general rule which is so often quoted, 118 U.S., at 374, 30 L.Ed., at 227:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and

> illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

The Court found sanction for this ruling in its previous cases dealing with immigrant tax and levy laws, which created numerous standards among state ports harmful to the uniform interests of international commerce and were enforceable at the whim and fancy of a single officer, Henderson v. Mayor, 92 U.S. 259, 274-75, 23 L.Ed. 543, 550 (1876); Chy Lung v. Freeman, 92 U.S. 275, 278-81, 23 L.Ed. 550, 551-52 (1876), and also in cases mandating the inclusion of blacks on jury venire rolls, Ex parte Virginia, 100 U.S. 339, 345-47, 25 L.Ed. 676, 679-80 (1880); Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567 (1881).

This Court denied any basis for discriminatory prosecution, upon stipulated facts that a law prohibiting

the unlawful visiting of a gambling house had been enforced only against Chinese persons, in Ah Sin v. Whittman, 198 U.S. 500, 507-08, 49 L.Ed. 1142, 1145-46 (1905). The Court found that an admission that so far only Chinese had been charged was not an admission of discrimination, but a submission of the facts for a determination of law. (As in the case sub judice.) In order to strike the law, valid on its face, because of "the manner of its administration" required evidence of intent to discriminate. As stated at 198 U.S., 508:

> No latitude of intention should be indulged in a case like this. There should be certainly to every intent. . . . This is a matter of proof; and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a state.

In Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 62 L.Ed. 1154 (1918), one mining company, whose assessment was still

active after a new appraisal, was evaluated at its full value while others had not yet been brought up to such value. The Court noted that "intentional systematic" within "the same class" may violate the right of the one who suffers the separate treatment. However, recognizing that the distinction in that case was "not incompatible with an honest effort in new and difficult circumstances" the Court, at 247 U.S., 353, held that no abridgment of the Constitution had occurred:

> There must be something more [than "mere errors of judgment"],--something which in effect amounts to an an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party. [Emphasis added.]

In Mackay Tel. & Cable Co. v. Little Rock, 250 U.S. 94, 63 L.Ed. 863 (1919), a

pole tax law was held not to have been unconstitutionally enforced merely because it was not enforced against other companies in the same manner, and recognized prosecution test cases as valid justification for selection. It was noted at 250 U.S., 100, 63 L.Ed., 869, that one company was taxed on all its poles and others were not, and the Court held (appropriate to this "Hustler" case):

> There was no offer to show an arbitrary and intentionally unfair discrimination in the administration of the ordinance, as in Yick Wo. . . . Peradventure the present action was a test case to determine whether the license fees were applicable to poles standing elsewhere than on the streets, with the intent, in case of an affirmative answer, to enforce the general ordinance against the other companies in the same sense.

Next in succession was the pre-eminent opinion of Chief Justice Harlan Stone in Snowden v. Hughes, 321 U.S. 1, 8, 88 L.Ed. 497, 503 (1944), where

the court stated:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person [such as a statute which clearly restricts a particular company . . ., or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself [such as a city denying laundry licenses to all Chinese applicants and issuing licenses to non-Chinese: Yick Wo v. Hopkins, supra. . . . But a discriminatory purpose is not presumed . . ., there must be a showing of "clear and intentional discrimination". . . .

The Snowden decision held that no federal cause of action was stated, and no denial of equal protection was involved, where a statute discriminated against successful and unsuccessful candidates

"since the distinction . . . is based on a permissible classification" (Id., 321 U.S., 8, 88 L.Ed., 502), and there was a "lack of any allegations in the complaint here, tending to show a purposeful discrimination" merely by characterizing such distinction with the epithets "willful" "malicious", "unequal, unjust, and oppressive" (Id., 321 U.S., 10, 88 L.Ed., 503-04).

This Court later clarified that mere selective enforcement was not unconstitutional enforcement. In Oyler v. Boles, 368 U.S. 448, 454-56, 7 L.Ed.2d 446, 452-53 (1962), the Defendant showed that he was one of six men qualifying for prosecution under a habitual offender law, but was the only one singled out for further action. The Court found that this selection was not an unconstitutional infringement on his rights, in the absence of evidence that the failure to proceed

against others was not due to lack of knowledge but was "the result of a deliberate policy" of discrimination:

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standards such as race, religion, or other arbitrary classification. Therefore, grounds supporting a finding of a denial of equal protection were not alleged. (Id., at 368 U.S., 456, 7 L.Ed.2d, 453.)

The necessity for looking closely at the facts and the prosecutor's intent is shown by the affirmance of a black's conviction in Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759 (1965), where it was not proven by the defense that all of the exclusions of blacks from jury panels was due to the prosecutor's peremptory policies, since great latitude was allowed in peremptory exercises and no right of

proportionate equality of race was constitutionally mandated. Justice White, speaking for five members of the Court, with Justice Black concurring in the result, concluded that where the exclusion of blacks was not shown beyond question to be the state's sinister responsibility, then the defendant who wishes to attack the prosecutor's motive and actions must "be required to establish on the record the prosecutor's conduct in this regard, especially where the same prosecutor for many years is said to be responsible for this practice and is quite available for questioning on this matter". Id., 380 U.S., 277-28, 13 L.Ed.2d, 777.

This statement is particularly relevant to this case because this attorney was assigned to enforce the obscenity statute in Cleveland and was made available for questioning. The defendants should have at least attempted

to prove more than that "Hustler" was the first "men's sophisticate" magazine to be tested for obscenity in Cleveland. No inquiry showed any personal malice against any defendant or against the magazine particularly. In fact, the police and prosecutor did not know anything more of the defendants except that they were the only such magazine owners who lived in the effective warrant jurisdiction of the Municipal Court.

Justice Goldberg, joined in dissent by Chief Justice Warren and Justice Douglas, felt that blacks should not be systematically prevented from jury seating, even by peremptory challenge. The dissent argued that a prima facie case of unlawful jury exclusion was made out by showing that no black had ever served in that county, and that the burden should be on the State to disprove discriminatory jury selection. Id., at

380 U.S., 239-42, 13 L.Ed.2d, 783-85. The dissent felt the greater duty on the defendant in that case was a rejection of prior cases such as Norris v. Alabama, 294 U.S. 587, 79 L.Ed. 1074 (1935); Patton v. Mississippi, 332 U.S. 463, 92 L.Ed. 76 (1945); and Henandez v. Texas, 347 U.S. 475, 98 L.Ed. 866 (1954), because no difference should be drawn between chosing blacks for a jury itself as opposed to calling blacks to a venire panel.

Such emotional issues as racial discrimination have quite properly charged the atmosphere of state-federal adjudications at the time. However, whether the owners of one allegedly obscene magazine should be the first defendants of their tax subsidized mailing privilege class to test the obscenity law under the Miller criteria should not elicit the same frustrations. Would it truly matter to the First Amendment

freedoms of speaking one's mind whether "Hustler" goes first, or whether "Hustler" and "Penthouse", "Swank", or another go first together? Must a city prosecutor in Cleveland charge one local defendant who lived 130 miles from the Municipal Court and also attempt to extradite for a misdemeanor another one or two or three publishers from Chicago, New York, or London, England? The defense complains that we deviated from our practice of charging the Cleveland residents who actually worked as clerks in local retail stores and theatres. It seems more rational and fair to make a test case with the persons responsible for one of the magazines, and who reap the greatest financial reward from the sexual appeal of these magazines, than to charge only local retailers. The potential for discrimination would have been far greater had the Cleveland prosecutor and police

arbitrarily picked one retailer to buy two or three magazines from for evidence. Wouldn't we have been criticized for picking one store over another, and on what basis? Would it have been more "fair" to arrest every one of the hundreds of local merchants and purchase several hundred magazines to do so? Such an alternative places a "heavy burden" on the budget of the Prosecutor's Office as well as the Police Department and the Municipal Court, not to mention the mammoth complexity created for a jury and the appellate courts. The defense costs would also have been astronomical and the owners of the magazines would either escape the melee or be forced to underwrite the cost in any event.

The Court's majority decision in Swain, supra at 380 U.S., 226-27, 13 L.Ed.2d, 776, still maintained the established rule that:

> Petitioner has the burden of proof and he has failed to carry it. . . . This is not to say that a defendant attacking the prosecutor's use of peremptory challenges over a period of time need elicit an admission from the the prosecutor that discrimination accounted for his rejection of Negroes, any more than a defendant attacking jury selection need obtain such an admission from the jury commissioners. But the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time. [Emphasis added.]

The difference of opinion between the majority and dissent in Swain is not a difference of philosophy regarding civil rights for blacks as a difference between judicial philosophies which we feel the Court should reach beyond the record before it and deal with the "real" problem or rule on the actual evidence by application of rules of law, with deference given to the "presumption" of prosecutorial regularity. This choice is not necessary in this case.

The next case in this Court's established line of discriminatory prosecution rulings is Cameron v. Johnson, 390 U.S. 611, 20 L.Ed.2d 182 (1968). In this case, involving civil rights issues in relation to an anti-picketing statute enacted during the course of an ongoing voter registration demonstration, Justice Brennan, for a seven vote majority, held that the statute was constitutional on its face and that the record did not establish bad faith or selective enforcement designed to harass them with no expectation of obtaining convictions. Dissenting Justices Fortas and Douglas felt, on the contrary, that the proseuctors did seek to harass and were not honestly hoping for a valid conviction. This Court had once remanded this controversy to the federal court for consideration of the standards of Dombrowski v. Pfister, 380 U.S. 479, 14

L.Ed.2d 22 (1965), and upon a second dismissal, this Court affirmed on the merits. (See: 390 U.S., 613-14.) This Court noted the duty of the authorities to attempt enforcement of the new law, even though no arrests were made prior to the change in the law. Cameron, supra at 390 U.S., 620-21, 20 L.Ed.2d, 190.

This is not materially different from the Cleveland authorities continually proving that obscenity consisted of the books and films from so-called "adult" bookstores and theatres and then trying to prove that certain other magazines were also now obscene because the level of explicitness in showing lewd exhibition of the genitals rather than "mere nudity" and providing some "hard core" selections have pushed them, such as "Hustler", over the brink of the law as announced in Miller v. California, 413 U.S. 15, at 24-25 (1973). The Ohio courts have clearly mandated that

the "Miller Test" was a necessary part of Ohio jury instructions. State of Ohio v. Ronald Burgun, 56 Ohio St.2d 354, 356-61, 384 N.E.2d 255, 258-61, 10 Ohio Ops.3d 485 (Sup. Ct. Ohio 1978); State of Ohio v. Dalene Burgun, 49 Ohio App.2d 112, 123-24, 127, 359 N.E.2d 1018, 1025-26, 3 Ohio Ops.3d 177 (Ct. App. Cuyahoga County, 1976). This adoption of the Miller standards by authoritative construction would be applied to "Hustler" at trial and was the basis for the trial court finding that the Ohio statute is constitutional and that the two issues of "Hustler" which are involved in this case "are obscene as a matter of law and not entitled to protection under the First Amendment". Memorandum To Attorneys, see Joint Appendix at A-5.

The Court in Cameron v. Johnson, supra at 390 U.S., 620-21, 20 L.Ed.2d, 190-91, recognized that it would "strike

down applications of constitutional statutes which we have found to be unconstitutionally applied to suppress protected freedoms. See: Cox v. Louisiana, supra [379 U.S. 559, 13 L.Ed.2d 487 (1965)]; Wright v. Georgia, 373 U.S. 284, 10 L.Ed.2d 349, 83 S.Ct. 1240 [1963]; [1963]; Edwards v. South Carolina, supra [372 U.S. 229, 9 L.Ed.2d 697 (1963)]."

The Court also noted that "the record is not totally devoid of support for the State's claim "that the picketers were or may have been violating the statute and disposed of the case upon the established selective enforcement principles:

> But the question for the District Court was not the guilt or innocence of the persons charged; the question was whether the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights. The mere possiblity of erroneous application of the statute does not amount "to the irreparable injury necessary to justify a disruption of orderly

> state proceedings." Dombrowski v. Pfister, supra, at 485, 14 L.Ed.2d at 27. The issue of guilt or innocence is for the state court at the criminal trial; the State was not required to prove appellants guilty in the federal proceeding to escape the finding that the State had no expectation of securing valid convictions.

In light of the facts freely established at the hearing in Cleveland Municipal Court, it would be an insult to the principles sought to be protected in Dombrowski to treat the "right" to publish pornography as a suspect classification or a specially protected exercise in a fundamental freedom. See: Paris Adult Theatre v. Slaton, 413 U.S. 49, at 66, 37 L.Ed.2d 446, 462 (1973). "Hustler" is certainly "pornographic" but whether it is "obscene" awaits trial. This Court in Miller, supra at 413 U.S., 18, footnote 2, recognized that "Pornographic material which is obscene forms a subgroup of all 'obscene' expression, but not the whole,

at least as the word 'obscene' is used in our language." When the City of Cleveland was brought complaints from the "community" that "Hustler" was possibly offensive, that was a reasonable basis upon which to begin action to judicially determine whether "Hustler" was also legally obscene.

In fact, certain of the "men's sophisticates" (as the magazine industry classifies these titles) have been tested for their obscenity. In Penthouse International, Ltd., v. McAuliffe, 610 F.2d 1353, 1362-73 (5th Cir. 1980), the January 1978, issues of "Penthouse" and "Oui" were found obscene but the same month of "Playboy" was found not obscene. In another case, cited with approval in footnote 4 of the Penthouse case, supra at 1368, the Court of Appeals of Illinois, per Justice Charles E. Jones, found the February 1976 "Playboy" not obscene but

found the February 1976 "Viva", the February and March 1976 "Playgirl", the December 1974 "Genesis", the April 1976 "Dapper", the March 1975 "Gallery", and two magazines entitled "Love Games" and "Loving Couples" were, in fact and law, obscene. City of Belleville v. Morgan, 60 Ill. App.3d 434, 17 Ill. Dec. 558, 376 N.E.2d 704 (Ct. App. Ill. 1978). "Hustler" has also been found obscene, in a case involving eight monthly issues of "Hustler" and three issues of "Chic" (another "Larry Flynt Publication") which were all found obscene by the jury and appeals court. Flynt v. State of Georgia, 153 Ga. App. 232, 264 S.E.2d 669, at 679 (Ct. App. Ga. 1980), cert. den. by Sup. Ct. Ga. 1980, cert. den. 64 L.Ed.2d 837 (Oct. 6, 1980).

In the area of racial discrimination, in Washington v. Davis, 426 U.S. 229, 239-48, 48 L.Ed.2d 597, 507-12 (1976), and

Arlington Heights v. Metro. Housing Corp., 429 U.S. 252, 264-68, 50 L.Ed.2d 450, 464-66 (1977), it was repeated that: "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." The analogy to established criminal law enforcement is strong that mere selectivity is not unlawful but that an intent to systematically harass or injure the selected defendant is dependent on "whether invidious discriminatory purpose was a motivating factor". As summarized in Arlington Heights, supra at 429 U.S., 265: "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." This Court in Washington, supra at 426 U.S., 238-39, made clear that the lower court erred in focusing "solely on the racially differential impact" of the

practice rather than on the "possibly discriminatory purpose". This is the same error committed by the Cleveland Municipal Court in dismissing these obscenity charges solely because "Hustler" was the first and only such magazine then on the Court's docket, without giving any consideration to the prosecutor's reasons for selection or the rational basis for choosing "Hustler" as a test case.

Finally, this Court unanimously held that a prosecutor may choose which of two unequal penalty statutes under which an offender is to be sentenced. United States v. Batchelder, 442 U.S. 114, 60 L.Ed.2d 755 (1979). The traditional rule of Oyler v. Boles, supra, was applied with due consideration for the flexibility of prosecutorial discretion, and as long as the government does not discriminate "against any class of defendants" "based upon an unjustifiable standard such as

race, religion, or other arbitrary classification", there is no violation of Equal Protection or Due Process. The Court characterized the necessary form of discriminatory standard as a prosecution which is "motivated by improper considerations". Batchelder, supra, at 442 U.S., 124-25, 60 L.Ed.2d, 764-65, and footnote 9.

The end result of this Court's decisions, from Yick Wo to Batchelder, are general guidelines for determining whether selection of a defendant is unconstitutionally discrimantory (See also: 16 Am. Jur.2d, Constitutional Law, Section 541, p. 930):

1. The burden is on the defendant to show that he has been singled out for prosecution. Snowden v. Hughes, supra; Oyler v. Boles, supra; Swain v. Alabama, supra.

2. That the evidence must show the

defendant is one of a class of substantially similar violators of the law. Yick Wo v. Hopkins, supra; Ah Sin v. Whittman, supra; Snowden v. Hughes, supra.

3. That the exclusion of other guilty parties is affirmatively shown to be part of a conscious, intentional, and deliberate policy or practice on the part of a prosecutor who knowingly enforces such policy over a period of time. Yick Wo v. Hopkins, supra; Ah Sin v. Whittman, supra; Swain v. Alabama, supra; Washington v. Davis, supra; Arlington Heights v. Metro. Housing Corp., supra; Sunday Lake Iron Co. v. Wakefield, supra.

4. That the prosecutor's invidious policy is clearly designed to harass the defendant in order to prevent the exercise of a fundamental right or to suppress a certain class of persons with no rational basis for distinction. Yick Wo v. Hopkins, supra; Mackay Tel. & Cable Co. v.

Little Rock, supra; Snowden v. Hughes, supra; Oyler v. Boles, supra; Cameron v. Johnson, supra; United States v. Batchelder, supra.

5. That the prosecution is not a bona fide test case but rather is shown to be in bad faith with no hope of obtaining a valid conviction. Mackay Tel. & Cable Co. & Little Rock, supra; Cameron v. Johnson, supra.

B. Federal Court Cases On Discriminatory Prosecution

Numerous federal appeals and district courts have recited the general rules discussed above, especially referring to Yick Wo and Snowden, supra, and proceeded to decide whether the defendants' proof has satisfied the elements of unlawful discrimination. See: Adam Clayton Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970) (election errors do not amount to racial discrimination); Moss v. Hornig, 314 F.2d 89 (2d Cir. 1963)

(being one three violators of Sunday law charged where others not charged is not sufficient to prove purposeful discrimination); United States v. Crowthers, 456 F.2d 1074, 1078-80 (4th Cir. 1972) (Pentagon could not allow favorable demonstrations and prevent unfavorable groups); United States v. Raven, 500 F.2d 728, 733 (5th Cir. 1974) (unfair selection not proved by being first defendant charged under statute); United States v. Ream, 491 F.2d 1243, 1246 (5th Cir. 1974) (defendant not entitled to challenge selection unless proof offered to doubt prosecutor's motive); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965), cert. den. 381 U.S. 935 (1965) (prosecutor's choice to indict defendant was matter of proper discretion); Delia v. Court of Common Pleas of Cuyahoga County, Ohio, 418 F.2d 205, 206 (6th Cir. 1969) (state court action in incorrectly

applying state law is not purposeful discrimination); United States v. Falk, 479 F.2d 616, 620-21 (7th Cir. 1973) (En Banc) (vocal and successful draft counsellor only person charged with failing to carry draft card); United States v. Catlett, 584 F.2d 864, 866-67 (8th Cir. 1978) (no denial to bragging tax evader); United States v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976) ("colorable basis for selective prosecution claim" must be shown to require discovery); United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974) (defendant must be allowed to present defense to tax prosecution of intentional discrimination); United States v. Steele, 461 F.2d 1148, 1151-52 (9th Cir. 1972) (unlawful to charge leaders of census resistance movement and not others without explanation or justification for selection); United States v. Sacco, 428 F.2d 264, 271 (9th

Cir. 1970) (suspected criminal activities was sufficient basis to select defendant for alien registration violations); Spillman v. United States, 413 F.2d 527, 530 (9th Cir. 1969), cert. den. 396 U.S. 930 (1969) (mere deviation from prosecutorial "policy" could not justify acquital); Dear Wing Jung v. United States, 312 F.2d 73, 75 (9th Cir. 1963) (no frivolous discovery permitted where bare epithets were unsupported by proffer); and Boynton v. Fox West Coast Theaters Corp., 60 F.2d 851 (10th Cir. 1932) (that other prosecutors do not prosecute does not prevent fair enforcement by one prosecutor against theater for Sunday law). See also: Morgan v. Detroit, 389 F.Supp. 922 (E.D. Mich. 1975) (no denial to prosecute prostitutes and not customers where it was arguable whether customers came within statute used); 227 Book Center, Inc. v.

Codd, 381 F.Supp. 1111 (S.D.N.Y. 1974) (both stores and theatres who violate obscenity law must be charged); United States v. Robinson, 311 F.Supp. 1063, 1064-65 (W.D. Mo. W.D. 1969) (defendant cannot be singled out for prosecution without justification); and Epstein v. Maddox, 277 F.Supp. 613 (D. Ga. 1967), aff'd. 401 F.2d 777 (5th Cir. 1968) (consistent or protracted or collusive discrimination is unlawful, but test case is permissible to enforce against all offenders since government must start with someone).

Although some cases, such as U.S. v. Cox, supra at 171, U.S. v. Raven, supra at 733, and U.S. v. Ream, supra at 1246, place great weight on the discretion of prosecutors, it has also been said that a hearing need be held only if the defendant makes a preliminary showing sufficient to "raise a reasonable doubt about the

prosecutor's motive". U.S. v. Falk, supra at 620-21. The Petitioners' Brief, at 18, recognizes the ultimate burden of "the defendant to prove discriminatory enforcement, when purposeful discrimination is shown", but adds that the case law also requires a shifting of the burden to the prosecutors to "demonstrate a compelling interest that necessitates the discrimantory enforcement of serious criminal statues", and that such shift should occur after only "a mere threshold showing of discrimination". The cases cited and all the cases reported, however, do not support such a broad departure from the established rules. In U.S. v. Falk, supra at 624, U.S. v. Crowthers, supra at 1078-79, U.S. v. Steele, supra at 1151, and Murguia v. Municipal Court, 124 Cal. Rptr. 204, at 216 (Sup. Ct. Cal. 1975), none of the courts relied on a "mere threshold

showing" but all involved a record which clearly convinced the courts that an evil motive underlie each selection of defendants. In Falk, supra at 621, the court noted the prosecutor's admission that he charged Falk for not carrying his draft card because he was a draft counsellor and because "a good deal of their trouble in enforcing the draft laws came from people such as Falk". In Crowthers, supra at 1078, that court noted that there was "not one scintilla of evidence in the record" that the government offices were actually impeded or disturbed by the arrested demonstrators but that "the record strongly suggests invidious discrimination and selective application of a regulation to inhibit the expression of an unpopular viewpoint". The Crowthers court recognized that it was basing its decision in part "upon reversal of the ordinary burden of proof"

and did so because "there is enough in the record to show unequal and oppressive application", such as "approved" rallies of twice the size of the defendants'. The motive of the Pentagon was not to select the defendants on the basis of noise or disturbance but to stifle voices they disliked. Id., at 1079. In Steele, supra at 1151-52, the court applied the general burden rules but found support in the record for a plan by the government to purposely hamper Steele's anti-census campaign while leaving others alone, especially since the "government offered no explanation for its selection of defendants, other than prosecutorial discretion". In Murguia, supra, the evidence clearly showed, and the prosecutor impliedly admitted, that these defendants were charged with traffic and criminal code violations because they belonged to a particularly active Union.

The court held on this showing, not that dismissal was warranted, but that further discovery must be allowed.

The Petitioners' Brief, at 15, 17, also admits that both selection and discrimination must be proved, even when the First Amendment is alleged to be the defendant's shield. These two-parts of the test for selective discrimination are particularly well stated and supported by the recent decision of U.S. v. Catlett, supra at 866. The late Senior Circuit Judge of the Eighth Circuit, Judge Van Oosterhout, stated the following standard in a case alleging a selection of the defendant "which penalizes him for exercise of his first amendment rights" because the defedant had "received widespread publicity and notoriety":

> To establish the essential elements of a prima facie case of selective discrimination, a defendant must first demonstrate that he has been singled out for

> prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Second, the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his first amendment right to free speech. United States v. Berrios, 501 F.2d 1207, 1211 (2nd Cir. 1974). We approved of this two-pronged test of "intentional and purposeful discrimination" in United States v. Swanson, 509 F.2d 1205, 1208-09 (8th Cir. 1975). See also United States v. Ojala., supra, 544 F.2d at 943.

Another relevant case is 227 Book Center, Inc. v. Codd, 381 F.Supp. 1111 (S.D. N.Y. 1974), which involved a Section 1983 action by "adult" bookstore companies seeking to prevent prosecution of porn stores because no action had been taken against porn theatres. The court repeated that intentional and purposeful discrimination was required and allowed the cause of action to proceed in order to allow plaintiffs to attempt to prove that

the purpose of the discrimination was to drive all the stores out of business but leave the theatres alone to violate the obscenity laws. In Cleveland, all of the "adult" theatres and bookstores were continually charged and the effort to broaden the scope of enforcement into the "drugstore porn" industry is more in keeping with equal enforcement than a violation of equal protection.

C. State Court Cases On Discriminatory Prosecution

Unlike the majority of federal cases on this issue, which deal most often with political speech and tax evasion matters, the state court cases on selective enforcement have generally been involved with Sunday closing laws, habitual offender statutes, and prosecutions of certain public officials.

A general statement of the rule as to unconstitutional enforcement of otherwise valid laws is set out in 16 Am.

Jur.2d, Constitutional Law, Section 541, p. 930:

> Mere errors of judgement by officials will not support a claim of discrimination violative of constitutional guaranties of equality. Moreover, it is not enough to show that a law or ordinance has not been enforced against other persons as it is sought to be enforced against the person claiming discrimination. Mere laxity on the administration of the law, no matter how long continued, is not and cannot be held to be a denial of the equal protection of the law. To establish arbitrary discrimination inimical to constitutional equality, there must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. Some courts have taken the position that in the absence of facts properly pleaded, showing a fixed continuous policy of unjust discrimination on the part of a municipality, they will not enter on a consideration of the question whether its administration is in violation of the guaranties as to the equal protection of the laws.

In a case often cited by other courts, and relied upon specifically by

both the Ohio Court of Appeals (A-12) and the Ohio Supreme Court (A-22) in this case below, People v. Utica Daw's Drug Co., 16 A.D.2d 12, 225 N.Y.S.2d 128 (1962), the Appellate Division of the Supreme Court of New York clarified the law as to burden of proof, matters of evidence, and requirements of the law. While remanding for a new trial, the court gave guidance on issues which are most applicable to this "Hustler" magazine case:

> [E]ven if the enforcement of a particular law is selective, it does not necessarily follow that it is unconstitutionally discriminatory. Selective enforcement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity. Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be

> unnecessary. It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that constitutional violation may be found. (Id., 225 N.Y.S.2d, 136.)

The highest court of New York also gave its approval and support for these established principles in People v. Goodman, 31 N.Y.2d 262, 290 N.E.2d 139, at 143 (Ct. App. N.Y. 1972).

Another pertinent New York case involved the use of health and building codes by the Midtown Task Force to attempt to put a dent in the blight and crime of downtown Manhattan caused in no small measure by the proliferation of flagrant obscenity law violators in the numerous sex-related establishments, adult bookstores, peep shows, etc. People v. Mantel, 88 Misc.2d 439, 388 N.Y.S.2d 565 (Crim. Ct. City of N.Y., 1976). The court found "no real dispute as to the

activities themselves", despite "press release or political bombast" statements that the City would "stop at nothing when we try to put these people out of business". Id., at 388 N.Y.S.2d, 567. The court concentrated on "the strictly legal question whether, given the City's limited resources and inability to prosecute all Administrative Code violations, the decision to deploy the resources of the Midtown Enforcement Project against sex-related establishments was a legitimate exercise of prosecutioral power or a violation of defendants' right to nondiscriminatory prosecution under the Fourteenth Amendment". Id. The Court found ultimately that no further hearing was called for and that the allocation of resources was "both rational and permissible". Id., at 569. The court also stated the reasonable standards for making such review. Id., at 568:

> The test of whether a prosecutor has made a reasonable classification would better be judged along more traditional lines of permissible prosecutorial discretion, i.e. police resources, the social value of a particular conviction as against the time and expense to the state, the value of a "striking" example, etc.

Another obscenity case in this area has recently upheld the established rules and found no constitutional excuse for law violations. Starley v. City of Birmingham, 377 So.2d 1131 (Ct. Cr. App. Ala. 1979), cert. den. No. 79-1476, 64 L.Ed.2d 815 (May 19, 1980). The court cited three general elements which must be proved (Id., at 1132-33): "(1) selectivity in enforcement, (2) selectivity that is intentional, and (3) selectivity based on some invidious or unjustifiable standard such as race, religion, or other arbitrary classification." The contention of those defendants was that they operated "adult book stores and theaters" and that

"numerous drug and convenience stores sold magazines (Playboy, Oui, etc.) containing sexually related matter similar to that portrayed in magazines sold at the adult book stores" (Id., at 1132).

The court concluded, Id., at 1133:

> A review of the evidence reveals that although enforcement of the Birmingham ordinance may not have been universal there is no evidence to indicate an intentional selectivity based upon an unjustifiable standard. The evidence does not indicate that the City focused its prosecutorial sights exclusively upon the appellant. It is apparent that appellant has not met his burden of proof in this regard.

The Supreme Court of Alabama denied certiorari, 377 So.2d 1135-36 (Dec. 21, 1979), and this Court also denied certiorari, 64 L.Ed.2d 815 (May 19, 1980).

Many other state courts have also applied the general rules established by this Court. See: State v. Nixon, 10 Wash. App. 355, 517 P.2d 212, 214 (Ct.

App. Wash. 1973) (no denial to habitual criminal absent proof of deliberate selection on unjustifiable standard); State v. Coutcher, 198 Kan. 282, 424 P.2d 865, 869 (Sup. Ct. Kan. 1967) (no denial to habitual criminal because codefendant not so charged); Bell v. State, 369 So.2d 932 (Sup. Ct. Fla. 1979) (prostitutes not denied protection because police not prosecuted for conduct involved in gathering evidence); People v. Battin, 77 Cal. App.3d 635, 143 Cal. Rptr. 731, 95 A.L.R.3d 248, 274-75 (Ct. App. Cal. 1978), cert. den. 439 U.S. 862 (1978) (case against political candidate not illegal when started by complaint from citizen-staff member of candidate to prosecutor who belonged to opposite party); People v. Edmonds, 578 P.2d 655 (Sup. Ct. Colo. 1978) (telephone company's non-subscriber not denied equal protection though subscribers not prosecuted for

extra phone since such is "rational basis" to select); State v. Hodgdon, 31 Or. App. 791, 571 P.2d 557 (Ct. App. Or. 1977) (convenience and better facilities for women prisioners at county jail justified charges under statute rather than ordinance, defendant must show purpose, not result, was discriminatory); Pier I Imports, Inc. v. Pitcher, 270 So.2d 228 (Ct. App. La. 1972), cert. den. 272 So.2d 696 (Sup. Ct. La. 1972) (no denial of equal protection when Sunday law violator was first and only store complained of by citizens); State v. Solomon, 245 S.C. 550, 141 S.E.2d 818, 14 A.L.R.3d 1277 (Sup. Ct. U.S.C. 1965), appeal dismissed for want of substantial federal question 382 U.S. 204 (1965) (mere non-action against other Sunday law offenders not enough in light of total absence of testimony to show purposeful discrimination); In re Hawaiian Land Co.,

487 P.2d 1070, 1075 (Sup. Ct. Hawaii, 1971) (mistakes of judgment not enough to prove defense, need "intentional violation of essential principle of practical uniformity", defense not proven on record before court, especially in light of limited resources of government officer); People v. Pearce, 8 Cal. App.3d 984, 87 Cal. Rptr. 814, 817 (Ct. App. Cal. 1970) (no proof of "malicious intent", selection justified by enforcement against greater threat to state or most efficient enforcement given limited resources).

The development and application of this Court's principles is no better illustrated then by the Ohio cases on this subject.

In State v. Flynt, 63 Ohio St.2d 132 (1980), the case now before this Court, the Ohio Supreme Court looked objectively at the record and found a failure of proof on the standard burden to show purposeful

discrimination. The recognized justification for testing the application of a statute was relied on absent proof that generalized enforcement was not likely to follow a successful result. Id., at 135 (Joint Appendix, at A-21-22).

In State v. Steurer, 37 Ohio App.2d 51, 58-60, 306 N.E.2d 425, 429-31, 66 Ohio Ops.2d 89 (Summit County, 1973), cert. den. 416 U.S. 940 (1974), the court repeated that more is needed than merely showing non-action against others. The court noted that prosecutorial discretion alone could not justify purposeful discrimination unless there was a "rational basis for the selection".

In an interesting application of common sense to this issue the Municipal Court of South Euclid, Ohio, held in the first case against a Sunday law defendant that other violators could not be ruled out from future actions. As stated in

City of South Euclid v. Bondy, 92 Ohio Law Abs. 108, 26 Ohio Ops.2d 69, 192 N.E.2d 139, at 142, (Muni. Ct. So. Euclid, 1963):

> True enough, the defendant Bondy is the first to be prosecuted for a violation of this law. But, as with violators of every law, someone has to be first.

Through the continued efforts to exact compliance by this defendant after his first conviction, the same court, on the third case against this defendant, stated in City of South Euclid v. Bondy, 95 Ohio Law Abs. 297, 28 Ohio Ops.2d 316, 200 N.E.2d 508, at 512 (Muni. Ct. So. Euclid, 1964):

> At some point of time, such conduct by a City must inevitably become tantamount to an intentional and purposeful discrimination. . . . However, in the opinion of this Court, the City's conduct has not quite reached that point. . . .

Absent a clear intent to persecute, rather than a reasonable policy of prosecution, the Ohio courts have consistently upheld these principles. See

also: State v. Wolery, 46 Ohio St.2d 316, 325-26, 75 Ohio Ops.2d 366, 348 N.E.2d 351, 358 (1976), cert. den. 429 U.S. 932 1976); Maloney v. Maxwell, 174 Ohio St. 84, 186 N.E.2d 728, 730 (1962); State v. Keich, 145 N.E.2d 352, 535 (Ct. App. Mahoning County, 1956).

Proposition of Law No. 2

THE COURT OF APPEALS, IN REVIEWING A MUNICIPAL COURT DISMISSAL OF CRIMINAL CHARGES ON DISCRIMINATORY ENFORCEMENT GROUNDS, MUST RULE ON THE SUFFICIENCY OF THE DEFENDANT'S EVIDENCE IN ESTABLISHING UNCONSTITUTIONAL ENFORCEMENT AMOUNTING TO CONSCIOUS, DELIBERATE, AND ARBITRARY DISCRIMINATION, AND IF THE DEFENDANT HAS NOT MET SUCH HEAVY BURDEN TO REMAND FOR TRIAL.

The Petitioner's Brief, at 25-28, makes a great controversy out of the allegation that the Ohio Court of Appeals and the Ohio Supreme Court substituted their own distorted version of the facts for that of the trial court. They rely for the most part on the dissent of Justice Paul Brown of the Ohio Supreme

Court in the case below, 63 Ohio St.2d, at 136-39 (Joint Appendix, at A-23-27), as they should. However, there really is no conflict in the "credibility of witnesses" nor in the facts established. They only difference of opinion between the trial and appellate courts is in the application of the plain facts to established principles of law. In fact, the majority of the Ohio Supreme Court went out of their way to make this clear in footnote 2 of their opinion (A-23) where it is stated:

> Implicit in this court's holding is a rejection of defendants' contention that the Court of Appeals reversed the trial court's dismissal of the complaints in the instant cause, based upon an improper deterimination of the credibility of the witnesses at trial.

In the Ohio courts, below, in reviewing the testimony of the prosecutor and police officer, and the claims of "Hustler", it was held that the burden of

proof must be on the defendants and that purposeful discrimination was not shown. In the trial court's Memorandum (A-5-7), Judge Calandra took the position that whatever available material is obscene should all be prosecuted and that one magazine, whether "Hustler" or whatever, cannot be singled out for a test case (A-6). The Court of Appeals unanimous decision (A-8-15) did not disagree with the trial court's findings that this was the first and only "men's magazine" to face such prosecution in Cleveland but did find that a test case is a proper rationale for beginning with "Hustler" because of the more offensive nature of these issues and the "greater difficulties of service" upon officers of other out-of-state magazines (A-13). The Court of Appeals also ruled that on the facts adduced, the defendants failed their heavy burden of proving that a "discriminatory

intent is present" (A-13), especially in light of the failure of defendants to question the assistant prosecutor's superiors as to whether they would prevent further generalized enforcement after the "Hustler" case was concluded (A-14-15). The Court of Appeals also took a more in-depth examination of the transcript of testimony and concluded that no "deliberate discrimination involving an arbitrary classification" was present and, to the contrary, "The selection of Hustler for a test case, in fact, was based on several rational factors differentiating it from magazines of th same format." (A-15)

The Supreme Court of Ohio agreed with the Court of Appeals in a six to one vote Per Curiam decision in State of Ohio v. Flynt, 63 Ohio St.2d 132, 407 N.E.2d 15 (July 16, 1980) (Copy in Joint Appendix at A-17-23). The Court applied the

established rules that the defendant's heavy burden is to prove an intentional selection, to the exclusion of others, and a purposeful discrimination, invidiously or in bad faith, and would not be presumed (A-20-21). The Supreme Court also noted that "the defendants did not establish that Hustler alone would be prosecuted" (A-22).

That no proof was given that further prosecutions would follow is obvious from the transcript of the hearing (A-29-139), and also in light of the intent to continue on the part of the witness-prosecutor, at A-103:

> My decision wouldn't be any different. I would be willing to prosecute, anyway. Certainly maybe a decision above me would prevent me which didn't prevent me in this case.

As stated by this Court in Sunday Lake Iron Co. v. Wakefield, supra at 247 U.S., 353: "The good faith of such officers and the validity of their actions

are presumed; when assailed, the burden of proof is on the complaining party." The testimony of the assistant prosecutor and police officer, below, that "Hustler" was being used as a test case in this area is entitled to the weight given by the Court of Appeals and Ohio Supreme Court. Dissenting Justice Paul Brown of the Ohio Supreme Court presumes that the trial court made factual inferences of bad faith (A-23-26) and that the defendants met their burden of proving "intentional or purposeful discrimination". However, the trial court's Memorandum (A-6-7) specifically rejected the test case rationale as not part of the law of discriminatory prosecution. Judge Calandra found that there simply cannot be such thing as a test case. His ruling incorrectly assumes that mere selectivity is unlawful. It is this application of law which was reversed by the Court of

Appeals and Ohio Supreme Court. Dissenting Justice Brown searched the record and made his own factual conclusions that the prosecution was "(1) on the basis of public sentiment and (2) for the purpose of inhibiting First Amendment rights" (A-25). These conclusions were not stated by the trial court and were held not to be proven by the record by the majority of the Ohio Supreme Court.

The contention of the Petitioners' Brief (at 25-29) that the Court of Appeals abused the traditional rule of deference to a trial court's factual findings are both untrue in this case and do not correctly recognize the law on this issue of appellate review.

The established general rule in Ohio is that a Court of Appeals has the power to weigh evidence and, on a properly presented question of law, has the duty to

weigh the trial court evidence. State v. De Righter, 145 Ohio St. 552, at 560, (1945); Cooper v. State, 121 Ohio St. 562, at 569 (1930); State v. Petro, 148 Ohio St. 473, at 500 (1947). See also: State v. Smith, 39 Ohio App.2d 190, at 195 (Hamilton County, 1974); and State v. Arrindella, 137 N.E.2d 136 (Per Curiam) (Hamilton County, 1956).

As such, the Court of Appeals is the last resort where the parties have a right to examination into the factual weight of the proof. Kramer v. Toledo & O. C. R. Co., 53 Ohio St. 436 (1895). The Supreme Court has been relieved of the duty to determine as to the weight of the evidence by Section 2953.02 of the Revised Code. State v. Martin, 164 Ohio St. 54 (1955); State v. Strozier, 32 Ohio St.2d 62, 64-65 (1972). The Supreme Court need only determine the legal questions concerning whether the proper rule of

proof and review was utilized by the Court of Appeals. Mentor v. Giordano, 9 Ohio St.2d 140 (1967); Rheinstrom v. Steiner, 69 Ohio St. 452 (1904); Elster v. Springfield, 49 Ohio St. 82 (1892).

The Cuyahoga County Court of Appeals, in this case, was not differing with the Cleveland Municipal Court on the credibility of the witnesses, but was ruling that the evidence presented did not amount to sufficient proof of "deliberate discrimination based on an unjustifiable standard". (Opinion of Court of Appeals at A-12.) This was a question of law and fact which is particularly within the province of the appeals court, as is their proper function.

The "well-settled rule of review" is, therefore, as stated above and as applied by the Court of Appeals and Ohio Supreme Court, rather than as alleged in the Petitioners Brief (A-25-29).

There simply is no factual controversy in the record or decisions in this case. The City of Cleveland's assistant prosecutor and police officers began this case to test our juries to this magazine. The admitted selection of "Hustler" as the first case was a valid exercise of discretion and allocation of resources. The trial court was incorrect in assuming that this selectivity was, in and of itself, enough to satisfy the test for relief under the Equal Protection and Due Process Clauses. Unless prevented from follow-up prosecutions by the assistant prosecutor's superiors, the intended general enforcement, as stated by the witness (A-103, 109-10, and 114), was entitled to acceptance. There has never been a hint that any of the superiors disapproved of this change in policy or would prevent further action if successful, and it was defendants' burden

to establish if this were the case. The trial court did not contradict this intent nor did his Memorandum (A-6) make findings which disagreed with or failed to apply this rationale. The trial judge simply concluded that he was not entitled to rely on this as a test case and that only generalized prosecution could suffice for an entry into this genre of magazines. These facts of selectivity, without malice or intent to continually select only "Hustler", do not meet the guidelines of Snowden v. Hughes, supra at 8, and Oyler v. Boles, supra at 456, as stated by the Ohio Supreme Court (A-20-21).

CONCLUSION

Mere selectivity in enforcement is not a denial of equal protection if based on some rational basis. That "Hustler" was picked as the first is no defense to a possible law violation and that "Hustler" is still the only such case pending is based upon our firm belief that extraditing owners from across the country or charging a few local merchants would be more unfair than establishing the limits of Cleveland's community standards with "Huslter". No improper movtive or classification was established or is evident in the record. The defendants would not have asked for a more open and responsive questioning of the assistant prosecutor and police. All our reasons and evidence was open for disclosure and the defendants failed to meet their burden of proving that or actions amounted to intentional and purposeful discrimination.

If the city prosecution staff were to prosecute all or several "adult" magazines of this type at one time, the burden in time and expense would be prohibitive. It seems only reasonable to test our community standards in a rational, deliberate method on a case-by-case basis. Such was the method adopted in this "Hustler" case.

The Petitioners established only preliminary selection, but it was not shown to be arbitrary or capricious. It certainly was not shown to be in bad faith, for purposes of harassment, or for obvious discrimination reasons.

Therefore the trial court's dismissal of the charges was not based upon sufficient legal justification, the Ohio Supreme Court and the County Court of Appeals were within their province and correct in remanding for trial, and this

Court should affirm these decisions and allow this matter to proceed trial.

For these reasons, the decisions of the Ohio Supreme Court and Court of Appeals should be affirmed.

Respectfully sumbitted,

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CERTIFICATE OF SERVICE

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